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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,
11
12 vs. Plaintiff,
13 GILBERTO AYUN-FLORES,
14 Defendant.

CASE NO. 16cr1115-BEN

ORDER DENYING
MOTION TO DISMISS
[Dkt. No. 52]

15 Now before the Court is Defendant's Motion to Dismiss. The motion to
16 dismiss the Indictment is denied.

17 **BACKGROUND**

18 Ayun-Flores is charged with the crime of being a Removed Alien Found in
19 the United States in violation of 8 U.S.C. § 1326(a) and (b). Ayun-Flores is a
20 citizen of Mexico. It does not appear that he has ever enjoyed lawful permanent
21 resident status ("LPR") in the United States. It appears that he entered the United
22 States sometime before 1996 as it appears he was convicted on June 27, 1995 of
23 felony kidnapping in Arizona state court.¹ It also appears he was later removed
24 from the United States. In April 2016, he was found in the United States north of
25 the international border.

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27 ¹Defendant admitted to this state conviction in a plea agreement signed in
28 December 2006 and filed in Case No. 06cr2456-GT. He admitted to the same state
conviction in another plea agreement signed in February 2012 in Case No. 10cr1723-
CKJ in the United States District Court for the District of Arizona.

1 **CHALLENGING THE CONSTITUTIONALITY OF**
2 **THE CITIZENSHIP STATUTES**

3 Defendant moves to dismiss based upon an argument that the citizenship
4 statutes are unconstitutional. This is an unorthodox argument² and it is not
5 persuasive.

6 Defendant's argument relies on the recent decision of *Sessions v. Morales-*
7 *Santana*, 137 S. Ct. 1678 (June 12, 2017). Defendant asserts that *Sessions* decided
8 that the citizenship laws of the United States facially violate the Fifth Amendment
9 equal protection clause. Defendant asserts that to be guilty of violating § 1326, one
10 must be a previously removed alien. Defendant then asserts that *Sessions*
11 invalidates all laws of the United States pertaining to the definition of citizenship
12 and alienage. With this syllogism, Defendant concludes that if the definition of an
13 alien is unconstitutional, he cannot be deemed an alien, and if he cannot be deemed
14 an alien, he cannot be found guilty of being an alien found in the United States after
15 having been previously removed. The argument stretches *Sessions* too far.

16 *Sessions* concerned the law regarding derivative citizenship under 8 U.S.C.
17 §§ 1407(a) and 1409(c). Defendant here makes no claim that he should be accorded
18 derivative citizenship. He makes no claim that a parent was a United States citizen.
19 He makes no claim of that sort at all. He simply swings *Sessions* as a blunderbuss
20 at the entire structure of laws concerning citizenship and alienage. To use
21 Defendant's words, "[*Sessions v.*] *Morales-Santana*'s substantive holding that the
22 citizenship laws facially violate equal protection means Mr. Hernandez-Gamez
23 cannot be convicted of a crime where being 'not a citizen' is an element of the
24 offense." The argument places too much weight on the *Sessions* decision. The
25 Supreme Court does not describe its decision as applying to provisions beyond
26 those defining derivative citizenship. It says nothing about § 1326. It says nothing

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²The motion filed here is an almost verbatim copy of a motion filed by another
defendant in *United States v. Hernandez-Gamez*, Case No. 17cr917-BEN.

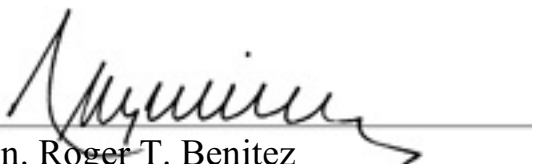
1 about § 922(g)(5). It says nothing about § 1101(a)(3). Defendant leans too heavily
2 on the finding of unconstitutionality pinpointed in *Sessions*, and the support fails to
3 hold. No decisions have yet been identified by Defendant adopting his argument.

4 Defendant does not assert he is a United States citizen. To the contrary, three
5 times Defendant has admitted before federal judges that he is a citizen of Mexico
6 and an alien in the United States. He first admitted his alienage and his guilt in
7 violating 8 U.S.C. § 1325 in a plea colloquy before the Court on September 7, 2001
8 in Case No. 01cr2733-GT. He again admitted his alienage in a plea colloquy before
9 the Court on December 5, 2006 in Case No. 06cr2456-GT. *See* Transcript of
10 Change of Plea, at 7 (Dkt. 14) (“Are you a citizen of Mexico? Yes.”); *see also* Plea
11 Agreement, at ¶ 4(b) (Dkt. 9) (“Defendant specifically admits and agrees
12 that . . . Defendant is an alien and not a citizen of the United States.”). More
13 recently he admitted his alienage in a Plea Agreement he signed on February 20,
14 2012 before the United States District Court for the District of Arizona in Case No.
15 10cr1723-CKG. *See* Plea Agreement, at 7 (Dkt. 48) (“I am not a citizen or national
16 of the United States.”). *Sessions* does not change his alienage, nor does it require
17 dismissal of the § 1326 charges.

18 CONCLUSION

19 Defendant is properly charged as an alien in violation of § 1326,
20 notwithstanding the Supreme Court’s decision regarding the derivative citizenship
21 statutes. The motion to dismiss the Indictment is hereby denied.

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23 DATED: October 2, 2017

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26 Hon. Roger T. Benitez
27 United States District Judge
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